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IN THE SUPREME COURT OF THE STATE OF ARIZONA

IN THE MATTER OF:	
PETITION TO AMEND RULE 7.6, ARIZONA RULES OF CRIMINAL PROCEDURE	No. R-12-0036
	REPLY TO COMMENT OF DEPUTY PIMA COUNTY ATTORNEY THOMAS RANKIN

I
INTRODUCTION

Petitioner begins this Reply by expressing his fondness and respect for his "Old Pueblo" dueling partner, Thomas Rankin. You will not find a nicer guy, nor more knowledgeable attorney in the field of "bond forfeiture" law than Mr. Rankin. Having said that, however, it is with profound sadness that Petitioner notes that Mr. Rankin, has, as will be discussed in more detail infra, turned to the "dark side." By that Petitioner means Mr. Rankin has now adopted the philosophy as espoused in the Comment of the Arizona Prosecuting Attorneys' Advisory Council. That is, "the only good bond is a completely forfeited bond" no matter if the defendant is either apprehended and returned prior to the entry of the bond forfeiture judgment, or if the defendant can and will be returned

because he is locked up in a sister state. (c.f. pages 1-3 of the Reply to the Comment of the Arizona Prosecuting Attorneys' Advisory Council filed May 31, 2013.)

Petitioner can avow that he has had numerous bond forfeiture cases with Mr. Rankin stretching back to the 1990's and his "turn to the dark side" occurred during the period discussed in the Introduction to his Comment.

II

STATISTICS EVIDENCING "BOND FORFEITURE FEVER"

Mr. Rankin begins his Comment with some interesting statistics. It is noted that for the six (6) year period ending in 2012 Pima County garnered almost seven million dollars ($7,000,000) in bond forfeiture revenue--and forfeited bonds at a ratio which exceeded 4-1. That is, for every 5+ bonds in which a bond was either forfeited or exonerated, the odds were overwhelming (better than 4 to 1) that the bond would be forfeited (presumably in its entirety). That falls within the Petitioner's definition of "bond forfeiture fever," (c.f. Petition, page 12) even if in the opinion of Mr. Rankin (Comment page 10), it does not.

Neither the Petitioner nor the bonding community in general takes issue with a forfeiture when the defendant has truly absconded. Sadly, the statistics listed do not reveal information which would have been

particularly relevant to our discussion, such as, how many cases involved defendants who truly absconded and were not found, how many defendants were apprehended and surrendered yet the bond was still completely forfeited, 1 and how many defendants were incarcerated in a sister state and yet the bond was completely forfeited notwithstanding the filing of an affidavit of surrender pursuant to Criminal Rule 7.6(d)(2). 2

III

AS WITH THE COMMENT OF THE ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL (COUNCIL) PETITIONER HAS PHILOSOPHICAL DIFFERENCES WITH MR. RANKIN, WHICH PHILOSOPHY OF THE COUNCIL HE HAS ADOPTED

The next section of the Comment, entitled "Purpose and Operation of Rules 7.6(c) and (d)" (c.f. Comment, pages 3-6) is similar to the philosophical argument advanced in the Comment of the Arizona Prosecuting Attorneys' Advisory Council, focusing on only one purpose of an appearance

1. By his own admission (Comment, pages 2-3) Mr. Rankin indicates that Pima County does not operate as Petitioner has alleged things are done in Maricopa County, that is, a flat $150 fee is charged when a defendant is apprehended and surrendered by the bondsman prior to the entry of a bond forfeiture judgment. (See Petition, pages 6-7). Indeed, Mr. Rankin's position/philosophy was that as espoused in the Campbell and Crayton cases c.f. Comment, page 16, and see footnote 2, infra. He (now) seeks to forfeit the entire amount of the bond in every case.

2. Discussed in footnote 5 of the Comment (page 16) are two (2) cases involving post-violation incarceration-in-a sister-state defendant. These cases will be discussed in more detail infra.

bond, to have the defendant appear at all proceedings, and completely ignores another, and equally important purpose, that of the encouragement of the bondsman for the apprehension and surrender of the absconding defendant State v. Vang, 763 N.W.2d 355, 358 (Minn. App. 2009).

As correctly pointed out in the Comment, even if a surety does apprehend and surrender the defendant, this guarantees absolutely nothing-State v. Old West Bonding Company, 203 Ariz. 468, 56 P.3d 42 (Ct. of Appeals, Div. 1, 2002). Any relief from a potentially complete forfeiture of the bond is left to the sole discretion of the trial judge. As pointed out in the Petition, this current system is simply not working as well as it should (c.f. Petition pages 4-7). The bonding community has tried to live solely with the changes to Criminal Rule 7.6 first adopted in 1998, but realized further modifications were necessary (c.f. Comment, page 8, Petition pages 1-2) given the strident attitude/philosophy of certain Arizona prosecutors.

IV
THE PETITION, IF ENACTED, WOULD BENEFIT THE ENTIRE CRIMINAL JUSTICE SYSTEM, NOT JUST THE BAIL BOND INDUSTRY

Mr. Rankin then laments (c.f. Comment, pages 6-8) that if the changes to Criminal Rule 7.6 are enacted the sole beneficiaries would be the "Bail Bond Industry." The "Bail

Bond Industry" does not dispute that if the proposed changes are enacted "a more level playing field" [c.f. Reply to Comment of the Arizona Prosecuting Attorneys' Advisory Council, page 11] will result. However, the beneficiaries to such a "levelling" will not just be the "Bail Bond Industry," it will be the entire Arizona criminal justice system. As noted in State v. Old West Bonding Company, 203 Ariz. 468, 475 56 P.3d 42, 49 (Ct. of Appeals, Div. 1, 2002) one of the "relevant considerations" for a court to consider when determining whether and in what amount" to forfeit an appearance bond includes "(6) the public's interest in ensuring a defendant's appearance." 3, 4 By endeavoring to discourage bondsmen from expending time and resources in connection with a a post-violation apprehension and surrender because the state/county has and will seek a complete forfeiture

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3. As additional evidence of Mr. Rankin's turning to the "dark side,"--of his desire to forfeit an entire bond notwithstanding any of the circumstances, he has espoused in his Comment (c.f. page 11) that the above cited "relevant consideration" as well as those others listed in State v. Old West Bonding Company, supra, are "dicta." Only in Yavapai County has that ridiculous argument been advanced before. Undersigned counsel criticizes Yavapai County each time it has raised it, and Yavapai County has yet never had success with it. Petitioner was critical of Mr. Rankin when he raised it the Campbell matter and remains critical of his complete misreading of State v. Old West Bonding Company, supra, in this Reply.

4. For a more complete discussion of this public policy argument see Petition, pages 9-12.

of the bond, anyway, (which it has, most successfully, see Comment, pages 1-2) this has and will most likely translate to more absconding defendants being unapprehended and remaining at large, notwithstanding a bondsman's contractual obligation to the indemnitor and the State. State of Kansas v. Sedam, 34 Kan.App.2d 624, 629, 122 P.3d 826, 831 (App. 2006). The litany of woes complained of on page 7 of the Comment are, essentially "solved" if the defendant is timely returned to custody--which the State should encourage, and not discourage.

V

IF THE SYSTEM WORKED AS ALLEGED IN THE COMMENT THERE WOULD HAVE BEEN NO NEED FOR THE PETITION

Mr. Rankin then begins "Part II of his Comment," (Comment page 8-10) by essentially saying, well, gee whiz, since the courts can exercise their discretion pursuant to State v. Old West Bonding Company, supra, what is the Petitioner complaining about? The answer to that question, as pointed out in the Petition and in the Replies to the Comments of the Arizona Prosecuting Attorneys' Advisory Council, the Maricopa County Attorney and the Maricopa County Superior Court is that more often than not a court merely gives "lip service" to State v. Old West Bonding Company, supra, and at the behest of prosecutors like Mr. Rankin and others of the Arizona Prosecuting Attorneys' Advisory Council (whom successfully advocate the "strict

liability" standard) and forfeit the entire bond, or virtually the entire bond, notwithstanding an apprehension and surrender. 5

VI

CONTRARY TO THE ARGUMENT IN THE COMMENT THE PROPOSED AMENDMENTS DO NOT IGNORE THE PRIMARY PURPOSE OF THE BOND, NOR MANDATE ABSOLUTION OF THE SURETY FROM LIABILITY IN POST-VIOLATION SCENARIOS

Mr. Rankin begins the next facet of his Comment (pagers 11-14) with a continuation of the prior "gee whiz the court can exercise discretion pursuant to State v. Old West Bonding Company, supra" argument. Having already dealt with that argument in this Reply, and in other Replies on file herein, Petitioner will not dwell any further on it, here, although it will be dealt with infra.

Commentor then endeavors to distinguish a pair of sister state cases cited in the Petition, State v. Amador, 98 N.M. 270, 648 P.2d 309. (S.Ct. N.M. 1982) and State v. Storkamp, 656 N.W.2d 539 (S.Ct. Minn 2003).

5. Contrary to the representation of Mr. Rankin in footnote 3 of his Comment, page 10, undersigned counsel has never accused a trial judge, either in court or in the Petition that he or she deliberately ignored a criminal rule or, as importantly for our discussion, the holding of State v. Old West Bonding Company, supra, for whatever reason. Petitioner merely points out that in the scores of cases undersigned counsel has been involved in concerning the problems sought to be corrected by the contents of the Petition, no judgment of the complete or virtually complete forfeiture of a bond has ever been reversed by the Arizona Court of Appeals, Division 1 and Division 2, because no "abuse of discretion" has ever been "found."

Those cases were cited as examples of jurisdictions and decisions which recognized that forfeiture of the entire bond because of incarceration in another state was an "abuse of discretion" (Amador) and that forfeiture of an entire bond after rapid apprehension and surrender by a bondsman was also an "abuse of discretion" and what was required was exoneration of the bond in full (Storkamp). Petitioner realizes that "the laws of other States, while helpful are not binding on (this court) Bunker's Glass v. Pilkington, PLC, 202 Ariz. 481, 491 paragraph 40, 47 P.3d 1119, 1129 (App. 2002) affirmed 206 Ariz. 9 (2003). Yet, nevertheless they (at least Amador) are examples of the "trend" in the law that incarceration in another jurisdiction no longer mandates complete forfeiture of a bond (See Petition, pages 10 and 11 citing Annotation 33 A.L.R. 4th 633 Bail, effect on surety's liability under bail bond under principal's incarceration in other jurisdiction. It is in recognition of this trend, and the failure of Arizona trial courts to follow such trend (although permitted to do so by the 1998 amendments to Criminal Rule 7.6) that the proposed amendments are submitted to "correct." As noted in the Petition (page 4 and 11-12) it has been the sad experience of Petitioner that trial courts rarely, if ever, give relief to a surety when a defendant is incarcerated in a sister

jurisdiction, (either pursuant to Criminal Rule 7.6(d)(2) or in light of State v. Old West Bonding Company, supra,) but, rather, adhere to the notion that incarceration in another jurisdiction is not a "valid explanation or excuse" c.f. Criminal Rule 7.6(c)(2) and State ex. rel. Ronin v. Superior Court, 96 Ariz. 229, 393 P.2d 919, (1964); State v. Rocha, 117 Ariz. 294, 572 P.2d 122 (App. 1977); and State ex. rel. Corbin v. Superior Court, 2 Ariz.App. 257, 407 P.2d 938 (1965). Petitioner stands by his representations made in the Petition (page 2) that "old habits" have been "too hard to break" and that trial courts, therefore, must be forced by this court to recognize and adhere to the modern trend in this area of bond law by the adoption of the rule language suggested in the Petition.

VII
ADOPTION OF THE PROPOSED LANGUAGE OF CRIMINAL RULE 7.6(d)(2)(a) AND 7.6(d)(2)(b) IS GOOD PUBLIC POLICY

Mr. Rankin next turns in his Comment (c.f. pages 14-18) to an explanation why the adoption of the proposed language of Criminal Rule 7.6(d)(2)(a) and 7.6(d)(2)(b) is "bad public policy." We begin with a discussion of proposed Rule 7.6(d)(2)(a). As indicated in the Petition this change would "codify" the "unwritten policy" of

Maricopa County to forfeit a flat $150.00 when a bondsman/surety successfully apprehended and surrendered a defendant back into the County Jail. Before dealing directly with Mr. Rankin's Comment and comments, Petitioner wishes to point out that both the Maricopa County Attorney and the Presiding Judge of the Maricopa County Superior Court (on behalf of the Maricopa County Superior Court) filed Comments to the Petition. However, neither Commentor, each being in a perfect position to know and challenge both the existence of the "unwritten policy" and the represented good it has done for Maricopa County, (c.f. Petition, pages 5-6)-yet neither Commentor challenged the existence of the policy or claimed that the court system would suffer if the policy were "codified." That is why Mr. Rankin's challenge to proposed Rule 7.6(d)(2)(a) rings so hollow.

Mr. Rankin then lists five (5) separate arguments/ reasons why the proposed rule changes are a "bad idea." He begins (Comment, pages 14-15) by claiming that "such a mechanism" would convert a bond with its pre-existing contractual terms into a 'speculative ... bond,' "ignoring the judicial determinations made in setting the bond." However true that may be, one could make the same argument about <u>any</u> bond in any bond forfeiture hearing. The rule, if adopted would simply, under a specific set of

circumstances, determine how much, albeit less that the "face amount" of the bond, to forfeit.

Mr. Rankin then represents (Comment, page 15) (Petitioner thinks) that through the proposed rule change the surety "seek(s) a waiver of extradition." Commentor goes on to complain that a surety "holds no party status or authority in extradition proceedings, etc." Petitioner confesses he does not understand the argument because through the rule change the surety has offered to compensate the state for the time and expense of arranging for extradition. While it is true that a bondsman/surety is in a position to exert pressure on a defendant to waive extradition (especially if a defendant or close family member has collateralized the bond, as is usually the case,--and that in the cases wherein Petitioner has been involved the defendant has generally waived extradition) nevertheless, the rule seeks no such "waiver."

Mr. Rankin then laments in his footnote 5 on page 16 of his Comment that Pima County has "experienced harm" in connection with two (2) bond forfeiture cases wherein the defendants' whereabouts were known because of their incarcerated status in a sister state. Petitioner can only assume based on the "ferocious fight" Mr. Rankin put up both in Campbell, (State v. Kenyatta Campbell,

CR2011-1461-003) and in Crayton, (State v. Kory Crayton CR2011-14789-001) 6 that the harm he complains of (especially in Campbell, supra,) is the fact that notwithstanding his lengthy Motion for Reconsideration, seeking the court to "change its mind" and forfeit the entire amount of the bond, when the court forfeited "only" $50,000.00 plus transportation costs, that because the Court denied the Motion Pima County was "harmed." And while it is true both in Campbell and Crayton their return to Pima County will not necessarily be instantaneous, nevertheless, they will be returned, and Mr. Rankin in his Comment has indicated no "harm" to Pima County being able to successfully prosecute the defendants, once returned.

As pointed out by Mr. Rankin in his Comment, the "harm" was significantly less in Crayton. In that case the amount of the bond exonerated, after payment of the the court ordered transportation costs, will probably end up being less than 15% of the face amount of the $30,000.00 bond.

What Mr. Rankin demonstrates with his argument about Campbell and Crayton is that only in the most rare of

6. Indeed, the Comment is a testament to Mr. Rankin's "ferocity." Not only did he use every line permitted in connection with the length of the Comment (Arizona Rules of the Supreme Court,) Rule 28D, but the Comment, unlike any other Comment filed, exceeded the length of the Petition.

occasions, and only after a protracted fight, can a bondsman/surety hope to pay anything less than a full forfeiture of a bond. And, if Crayton demonstrates a "trend" as Mr. Rankin seems to indicate that it will, the amount forfeited will still be in the 85-90% range. At this point Petitioner wishes to remind the Court that, as pointed out in State v. Amador, supra, 98 N.M. at 273, 648 P.2d at 312:

> Bail is not a source of revenue for the State. (emphasis added). The purpose of a bond or security is to secure a trial, its object being to combine the administration of justice with the convenience of the person accused, but not proved guilty. If the accused does not appear the bail may be forfeited not as punishment to the surety or to enrich the Treasury of the State but as an incentive to have the accused return or be returned to the jurisdiction of the court. (emphasis added.)

Accord: State v. Darwin, 70 Wash.App. 875, 877, 856 P.2d 401, 403 Wash. App. Div. 1, 1993 citing State v. Jackshitz 75 Wash. 253, 136 P. 132 (1913) "Bail is not a revenue measure in lieu of a fine or a method to punish sureties." By not adopting the proposed rule changes, the court will perpetuate this bad public policy of rewarding counties for their greed and intransigence; allowing them to not only get the defendant (back) but also most if not all of the bond money. That is unfair, wrong and bad public

policy.

Mr. Rankin, in his "third argument" (also on page 16 of his Comment) then turns his attention back to attacking proposed Rule 7.6(d)(2)(a). Mr. Rankin essentially claims that just because the $150.00 "flat rate forfeiture" when there has been a timely apprehension and surrender works in Maricopa County, codifying this practice is "ill advised." Why is it "ill-advised"? Not because it doesn't work in Maricopa County, but because it will cost Pima County money. Mr. Rankin doesn't phrase his opposition that way, but that is the bottom line.

Mr. Rankin's fourth argument (Comment, page 16 and 17) is a justification for the position of a complete forfeiture of a bond even in the case of apprehension and surrender, citing, as did the Council, State v. Donahoe, 220 Ariz. 126, 203 P.3d 1186 (App. Div. 1, 2009). As indicated in the Reply to the Council's Comment (c.f. pages 4-7) such reliance on Donahoe, supra was completely misplaced, as it is in Mr. Rankin's Comment.

Mr. Rankin's fifth and final argument (c.f. Comment, pages 17 in that facet of his Comment is another of his "gee whiz" arguments. Mr. Rankin claims no changes ought be made since "the policy of encouraging sureties to remand defendants "already exists." Petitioner supposes the obviously simple answer is, yes, but because of

prosecutors like Mr. Rankin and his ilk, fighting to forfeit entire bonds notwithstanding such "remand" the policy exists in name only, and not in application.

VIII
THE PROPOSED LANGUAGE OF CRIMINAL RULE 7.6(c)(1) SHOULD BE ADOPTED

Mr. Rankin concludes his Comment (c.f. Comment, pages 18-20) with an argument against the adoption of the changes suggested in the Petition about when the notice should be sent and what the timeframe for the hearing ought to be. Mr. Rankin, not surprisingly, solely relies on the experiences of Pima County as examples of why the system does not need changing. Actually, in this area Petitioner and Mr. Rankin are in agreement. Pima County does a good job in these areas. Sadly, the same cannot be said for her sister counties in Arizona, and it is for that reason the suggested changes have been made.

Respectfully submitted this 11th day of June, 2013.

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Copy of the foregoing
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